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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

NOS. 534 AND 535.

SHELTON PITNEY and WALTER P. GARDNER, Trustees of The Central Railroad Company of New Jersey, a Debtor,
Petitioners,

against

THE STATE OF NEW JERSEY, a Creditor,
Respondent.

SHELTON PITNEY and WALTER P. GARDNER, Trustees of The Central Railroad Company of New Jersey, a Debtor,
Petitioners,

against

THE STATE OF NEW JERSEY, a Creditor, and the CITY OF JERSEY CITY,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI.

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BRIEF IN OPPOSITION TO PETITION FOR WRITS OF CERTIORARI.

Statement of the Case.

The debtor is a New Jersey corporation, which, since October 30, 1939, has been undergoing reorganization under the provisions of Section 77 of the bankruptcy law. The State of New Jersey has filed proofs of claim (R. 118a) for unpaid property taxes assessed against the debtor for the tax years 1932 to 1939 inclusive, together with statutory interest upon such arrears. The debtor is also in arrears

of 1940 taxes. Objections were filed by the Trustees to the claims of the State (R. 126a-133a), setting up alleged excessive assessment valuations, discrimination in that non-railroad property throughout the State is assertedly assessed at a lower proportion of true value that was that of the railroad company, and that by virtue of such alleged discrimination the "average tax rate" for the State, applicable to the assessment of certain portions of the railroad property, was excessive. Divers objections were also made to the claim of the State for interest. The issues raised on the proofs of claim were referred to a special master on April 1st, 1941 (R. 3a) but no hearings were held thereon. The order of reference was revoked by the entry of Order No. 163, the making of which gave rise to the present litigation.

As of the date of the entry of Order No. 163, June 12, 1942, the debtor was in arrears of taxes to the State of New Jersey in the principal sum of $13,438,669.19, and interest charges thereon of $10,101,520.97 (R. 725).

On July 22, 1941, Chapter 290 of the Laws of 1941 (R. 172a) was adopted, under the terms of which the legislature of New Jersey offered to remit and cancel substantial portions of railroad tax interest arrears, on condition that the taxpayer file with the State Comptroller an agreement to pay its principal arrears in installments, which, in the case of the debtor, was for a period of twenty years, and deliver to the State Treasurer discontinuances of all pending tax litigation, and waivers of the right to contest any assessments for the years, 1932-1941, inclusive. The act provided that the various documents be in form acceptable to the Attorney General.

Conceiving that this statute violated the Constitution of the State of New Jersey in a number of respects, the Attorney General declined to consider the sufficiency of the docu-

ments, and, on September 4, 1941, filed an information in the Court of Chancery of New Jersey to enjoin the State Treasurer from acting under the statute. The amended information appears at page 159a.

On August 8, 1941, Order No. 123 (R. 139a) was made in the reorganization proceedings, instructing the Trustees to take advantage of the act by making the required tender. This order was entered *ex parte*. The State Treasurer declined to accept the documents because the Attorney General had declined to approve them (R. 155a, 253a). On November 24, 1941, Order No. 135 (R. 150a) was made, instructing the Trustees to make payment of 1941 taxes.

On May 21, 1942, after issue was joined in the Chancery information proceedings, Chapter 241 of the Laws of 1942 was adopted, amending Chapter 290 in a number of respects, but primarily having the effect of offering to waive all of the interest charges and eliminating the requirement that the Attorney General approve of the settlement documents. The pertinent text appears in the supplemental information (R. 177a). Chapter 241 further required that any railroad desiring to comply therewith must file the required documents and make its first installment payment on or before June 15, 1942.

Being of the conviction that Chapter 241 was similarly in violation of the State Constitution, the Attorney General immediately filed a supplemental information (R. 177a), and, on the same day, the Court of Chancery enjoined the State Treasurer (R. 193a) from accepting any of the settlement documents from any railroad and from receiving, depositing or distributing any payments made under the act. In July, 1943, the Court of Chancery held the settlement acts to be in violation of Article I, Section 20, of the State Constitution, prohibiting donations of state monies to private corporations, *Wilentz* vs. *Hendrickson*, 133 N. J. Eq.

447, and subsequently, on September 28, 1943, that Court entered its final decree in the proceedings, adjudging that the said legislation was null and void as violative of the Constitution of the State, and permanently enjoining the State Treasurer from executing its provisions. The decree has been appealed by special counsel representing the State Treasurer to the New Jersey Court of Errors and Appeals, where the case is noticed for argument on February 1st, 1944.

On June 2, 1942, the Trustees filed a petition praying, (1) for instructions as to whether they should comply with Chapter 241; (2) that the amount of the tax claim of the State of New Jersey against the debtor for the years, 1932-1939, inclusive, should "be fixed and adjudicated at the principal amount of taxes alleged to be due, payable in the manner, at the time, with the interest, and upon the terms and conditions prescribed by said Chapter 241"; and (3) that "the interest or interest penalties as claimed by or on behalf of the State of New Jersey in these proceedings . . . be disallowed" (R. 2a). The Attorney General appeared in opposition to Order No. 161, served upon him as attorney of record for the State, which required that cause be shown why the second and third prayers should not be granted. He filed and read an affidavit (R. 153a) in opposition, noting his objection to any undertaking by the court to determine the validity or constitutionality of the settlement acts, and, further, specifically reasserting the unconstitutionality of the legislation for the reasons set forth in the supplemental information in Chancery, a copy of which was annexed to his affidavit (R. 156a).

After hearing and argument, in the course of which the District Court specifically indicated its intent and purpose not to entertain any issue respecting the constitutionality of the settlement acts (R. 58a, 60a, 86a, 87a), the court, on

June 12, 1942, entered Order No. 163 (R. 14a), which, among other things, instructed the Trustees to comply with Chapter 241, found and determined that it was necessary that the court should, at that time, "pass upon . . . the amounts for which the State's claims should be allowed" (R. 21a), "that the Trustees . . . should not be required to comply with Chapter 241 . . . without a simultaneous order [by the court] adjudicating the amounts for which the aforesaid claims of the State of New Jersey, for the years 1932 to 1939 inclusive, and the balance in dispute for 1940 should be allowed", "that the offer of settlement officially tendered by the claimant through the enactment of Chapter 241 is a valid and subsisting offer . . .", and finally, reciting that "the court hereby adjudicates the amount for which said claims of the State of New Jersey against the Debtor's estate (including the balances in dispute for 1940), should be and they are hereby allowed as follows" (setting forth the sums of principal taxes owing), "payable in the manner, at the times, with the interest and upon the terms and conditions prescribed by said Chapter 241" (R. 22a). The order goes on to recite that "this court hereby adjudges that upon full compliance as aforesaid, Claims Nos. 34, 35, 36, 37 and 38" (the various tax claims of the State against the debtor and its subsidiaries), "will have been fully satisfied and discharged".

At the conference settling the order, the court personally wrote into the order, at the end of the draft as previously prepared by counsel for the Trustees (R. 111a), the following:

> "Nothing in this order contained shall be construed as passing upon the validity or invalidity of Chapter 290 of P. L. 1941 or Chapter 241 of P. L. 1942, attacks upon which are now pending in the State Courts".

The Attorney General filed an appeal to the Circuit Court of Appeals for the Third Circuit from the Order, complaining of the adjudication of the State's claim in the manner thus accomplished.

Subsequently, the New Jersey State Board of Tax Appeals entered judgments in appeals which had been filed both by the debtor and by the City of Jersey City (statutory recipient of part of the taxes), complaining of the assessments made by the State Tax Commissioner upon property of the debtor for the tax year 1939, these judgments dismissing the appeal of the debtor, and granting the appeal of the City of Jersey City, with the effect of increasing the debtor's tax liability for the year 1939 by some $126,000 (R. 212a). On September 22, 1942, over the objection of the Attorney General and of the City of Jersey City, the court entered Order No. 171, holding that the judgment of the Board on the Jersey City appeal was void as in conflict with the provisions of Order No. 163, and directing the Trustees not to seek a review in the state courts of the State Board judgment (R. 223a).

Both the Attorney General, on behalf of the State, and the City of Jersey City appealed to the Circuit Court of Appeals from Order No. 171 (R. 202a, 226a). The Circuit Court denied motions made by the Trustees to dismiss the appeals, based upon the contention that the Attorney General was without authority to prosecute such appeals on behalf of the State. The appeals from both Orders No. 163 and No. 171 were heard by the Circuit Court jointly, and that court reversed Order No. 163 upon the grounds that it was improper for the District Court to have made an order, which, while purporting not to, did in effect adjudicate the constitutionality of the tax settlement acts at a time when it was under notice of the fact that proceedings

were actually pending in the New Jersey Court of Chancery attacking the constitutionality thereof, and for the further reason that the determination and adjudication were made without giving the parties a hearing upon the question of constitutionality (R. 717-726). Order No. 171 was reversed because of its dependency on Order No. 163.

An application by the Trustees for rehearing was denied (R. 751).

Response to Statement by Petitioners of "The Questions Presented".

It is submitted by respondents that none of the questions asseriedly presented are actually involved, upon the basis of the record herein.

The first question posed by petitioners is:

> "(1) In a bankruptcy proceeding under Section 77, is the Bankruptcy Court devoid of jurisdiction to determine the validity and amount of taxes alleged by proof of claim filed by a state?"

The petition filed below by the Trustees, upon the basis of which Order No. 163 was entered, does not purport to present for determination the only then existing issue in the reorganization proceedings respecting the validity and amount of taxes owing to the State, *i. e.*, that arising out of the proofs of claim filed by the State and the formal objections thereto filed by the Trustees, which had previously been referred to a master. The petition sounds only in a prayer for instructions as to the Trustees' compliance with the settlement acts, and for an order to show cause why the tax claim of the State of New Jersey should not be fixed and adjudicated at the amount of the principal tax arrears, payable in the manner, at the time, with the interest, and upon the terms and conditions prescribed by

Chapter 241, and why the interest claimed by the State should not be disallowed, as provided by said Chapter 241. The contention made by the Trustees at the hearing that the interest should be disallowed for the additional reason that it constituted an unprovable "penalty" owing to a State, within Section 57(j) of the bankruptcy act (R. 38a), was subsequently abandoned by the Trustees, and the court, in entering Order No. 163, expressly disavowed any intent to pass upon the applicability of Section 57(j) (R. 107a). In its opinion, the Circuit Court of Appeals expressly held that it was not passing upon the right or power of the bankruptcy court, generally, to determine the amount and validity of taxes owing by a railroad company, in Section 77 proceedings (R. 724, footnote 2). There exists no impediment whatsoever to any present attempt by the Trustees to submit to the District Court any question relating to the amount or validity of the tax claims, subject, of course, to any proper legal questions which may be argued in the reorganization proceedings upon such an application.

The second question assertedly involved, is stated by the petitioners as follows:

> "(2) Where Trustees in bankruptcy have been ordered to accept an offer of settlement made by a statute of the claimant State and to abandon, as demanded by the statute, all right of further contest, is the Bankruptcy Court thereafter debarred from determining for itself the validity and amount of the taxes claimed, when the statutes of settlement are later declared unconstitutional?".

This question is essentially a repetition of the first. The Circuit Court did not, in terms or impliedly, direct the Trustees "to abandon . . . all right of further contest" of the tax claims. It merely affirmed the bankruptcy court

direction to the Trustees to comply with the conditions of Chapter 241, and that act only requires that a railroad taxpayer desiring to accept its provisions shall file with the State Treasurer an acceptance document waiving any rights to contest assessments made prior to December 1, 1941, and a written consent to the discontinuance and dismissal of pending proceedings in any court or board respecting such assessments (R. 179a). The waivers and discontinuances never became effective because of the preliminary and final Chancery injunctions against their acceptance by the State Treasurer, and therefore no effective abandonment by the Trustees of any rights of further contest of the tax claims has been made, as yet. Certainly, nothing in the instant record is in any way effective to bar the bankruptcy court from now proceeding to make a legal and proper determination with respect to the validity and amount of the taxes claimed, either at this time, or upon the conclusion of the appeal in the Court of Errors and Appeals from the determination of the Court of Chancery holding the settlement statutes unconstitutional.

The third question stated by the Trustees is as follows:

> "(3) In reversing the orders directing the Trustees to accept the second Act of Settlement, should not the Circuit Court of Appeals by its mandate have preserved to the Bankruptcy Court its right to review the claim for taxes and to the Trustees their right of contest, when the surrender of such rights was made in good faith in reliance upon the Acts of Settlement?"

This question is plainly frivolous. Since no issue was presented to the Circuit Court of Appeals involving the propriety or legality of any general review by the bankruptcy court of the tax claims, but only that of the court's adjudi-

cation of such claims solely upon the basis of the terms and conditions of Chapter 241, any specific provision by the Circuit Court of Appeals in its mandate, preserving such general right of review to the bankruptcy court, would have been entirely superfluous and, indeed, improper, as an adjudication with respect to an issue not heard or passed upon below.

The Trustees assert the existence of the third question on the basis of the statement in the opinion of the Circuit Court that if the settlement acts are unconstitutional, Order No. 163 would deprive the State of the "right to immediate collection of the whole of the principal and the interest on the delinquent taxes" (R. 721), and also upon the statement by the Circuit Court that should the acts be held invalid, "the State of New Jersey will sustain a loss of $10,101,520.97 in interest" (R. 725). Petitioners assert that these statements imply a finding that the entire principal and interest claim would become payable immediately and without more, upon the invalidation of the settlement acts. This imputation is entirely unwarranted. A reading of the full text of the opinion of the Circuit Court makes it perfectly plain that the Court meant only that Order No. 163 effectuated the provisions of Chapter 241, under which the debtor would have twenty years to pay off the principal arrears, otherwise currently due, and would further enjoy a cancellation of the full amount of its interest obligations. The Circuit Court was at that point expounding the pecuniary interest of the State, in justification of the status of the Attorney General to appeal from Order No. 163, and was not considering there the powers or duties of the District Court. It is not remotely inferable that the Circuit Court was adjudicating that the State of New Jersey was entitled to proceed immediately to the actual

collection of its tax claims, regardless of the pendency of the bankruptcy proceedings and any right or duty, if any, of the bankruptcy court to determine the amount and legality of the tax claims, as under section 64(a) of the bankruptcy act (11 U. S. C. A. Sec. 104(a)).

The further statement by the Circuit Court of Appeals complained of by petitioners, to the effect that the attempt by the Trustees to comply with Chapter 241 "was without legal effect" (R. 723) because of the Chancery injunction against the State Treasurer, obviously means only that the court was finding that in the then existing posture of affairs, there was no consummation of the settlement. The court did not state, and cannot reasonably be understood to have determined, that the Trustees are without the benefit, if any, of their tenders under the settlement acts, should those acts ultimately be adjudged valid by the Court of Errors and Appeals, and the injunction against the State Treasurer consequently vacated. A contrary implication plainly attends the specific direction in the opinion of the Circuit Court that those provisions of Order No. 163 which authorize the making of the tenders not be invalidated (R. 727).

The fourth question stated by the petitioners is as follows:

> "(4) Has the Attorney General of a State standing to take an appeal in the name of the State from orders of a Bankruptcy Court based on a state statute, when in a State Court he, as attorney for the people, is engaged in attacking, not upholding, the statute, and in the bankruptcy proceedings enters a special appearance in his own name challenging the jurisdiction of the Bankruptcy Court over the constitutionality of the statute because at issue in the State Court, and accordingly really appears in his capacity as attorney for the people and not as attorney for the State?"

While the issue involved in part of the foregoing question was raised by the Trustees in the Circuit Court of Appeals, no such question is properly presented upon this application as it involves only (1) an interpretation of the nature of the appearance by the Attorney General in the bankruptcy proceedings, a legal question determined by the Circuit Court purely upon the basis of the record, and therefore not properly warranting an application for certiorari out of this court; and (2) the question as to the character of the appearance of the Attorney General in the State proceedings, an issue which was not raised in the Circuit Court, and which, moreover, in no sense comprises an issue properly reviewable under the rules of this Court, on certiorari.

The fifth question assigned by the Trustees is as follows:

> "(5) Did not the Circuit Court of Appeals err in reversing the orders in face of the established doctrine of local New Jersey law that a statute, though later declared unconstitutional, will support rights acquired in good faith under it, when the orders reversed were essential to preserve a material change of status arising out of action taken in reliance upon a legislative offer prior to any constitutional challenge?"

This question is based upon a misconception of the local law of New Jersey, and further, upon the erroneous postulates that the petitioners acquired rights in reliance upon the settlement acts and that the orders reversed were essential to preserve a material change of status. This will be demonstrated hereinafter.

The sixth question alleged by the petitioners to be presented is as follows:

> "(6) Is not a Bankruptcy Court entitled to accept as the law of the State a duly enacted statute, when

on account of a time limit in the statute it must itself decide what the State law is, or else allow the statutory offer to lapse?''

No such question is presented by the record in this case, as the time limit in Chapter 241 did not, in any sense, render it incumbent upon the bankruptcy court to determine the constitutionality of Chapter 241. The basis for petitioners' assumption will be analyzed hereinafter.

Response to Petitioners' "Reasons Why Writs of Certiorari Should Issue".

(1) The petitioners allege, first, that the Circuit Court has decided important questions of federal law which have not been, but should be settled by this Court. The first such asserted question appears to constitute the allegation (a) that the decision and mandate of the Circuit Court have operated to deny the debtor a full hearing in objection to the New Jersey tax claims; the second (b) that the denial by the Circuit Court of the motion to dismiss the appeal of the State, as improperly brought by the Attorney General, constitutes an abrogation of orderly federal procedure. We shall discuss these contentions in the order stated.

Federal Questions Assertedly Presented.

(a) The Alleged Denial of Review of Tax Claims.

Nothing has transpired which has operated to deny the debtor full hearing on the tax claims of the State for any of the years 1932-1941, inclusive, either in the State courts or in the bankruptcy court. With respect to some of the tax years in question, the debtor has had and availed itself of full rights of review. As to other years it may still maintain further State court reviews, if its equities are as it asserts on this application, and, as to still other years, it has

deliberately and advisedly declined to take steps to preserve its right of review, without in any way impairing its opportunity to take full advantage of the settlement acts. As indicated above, nothing which has taken place in any way impairs its right, if any, now to seek such review as the bankruptcy court is legally qualified to make of the amount and validity of the State taxes, under Section 64(a) of the bankruptcy act.

The Trustees concede that they have fully exhausted all rights of review *extra* the bankruptcy proceedings, as to the tax years, 1932-1936. With respect to the tax years, 1937-1938, the debtor enjoyed a full and exhaustive review before the New Jersey State Board of Tax Appeals. Its complaint for these years was fully considered and finally dismissed by the Board, as without merit, on May 13, 1941. *Central Railroad Co. of N. J.* v. *J. H. Thayer Martin,* 19 N. J. Misc. 427, 20 A. 2d 330. Since the Board is a quasi-judicial tribunal, *West Orange* v. *State Board of Tax Appeals,* 115 N. J. L. 396, 399, *Ettrick* v. *State Board of Tax Appeals,* 12 N. J. Misc. 432, 435, the debtor has undoubtedly been accorded due process.

The petitioners appear to claim, however, that a further judicial review of the decision of the Board is necessary to comply with the requirements of due process, and they assert that this they were denied because they failed to prosecute such review within the three month period provided by the New Jersey statute (R. S. 54:26-11), relying upon the apparent validity of Chapter 290, enacted July 21, 1941, and tendered the settlement documents under that act prior to the filing of the civil information in Chancery by the Attorney General. Without conceding that anything more than the hearing before the State Board of Tax Appeals on the 1937-1938 tax appeals was necessary from the

standpoint of due process, it is clear that nothing in Chapter 290 in any way operated to deprive the debtor of its right to apply for certiorari proceedings in the New Jersey Supreme Court. No agency of the State of New Jersey took any action impairing the free and unfettered statutory right of the debtor to continue its litigation with respect to these tax years. If, moreover, as the petitioners seem to suggest, the action of the State legislature in proposing an apparently valid tax compromise induced the debtor, in good faith, to refrain from further court review of these taxes, with a resulting inequity should the acts ultimately be held unconstitutional by the Court of Errors and Appeals and the Trustees nevertheless be deprived of their statutory review, such inequity will undoubtedly, under the New Jersey cases, operate to permit further review in the New Jersey courts, despite the three month limitation aforesaid. This is for the reason that a statutory time limitation will be held to be not binding upon the inherent right of the New Jersey Supreme Court to issue certiorari if such limitation operates unreasonably under the circumstances of a particular case. *Red Oaks, Inc.* v. *Dorez, Inc.*, 117 N. J. L. 280, 283. Thus, either the Trustees have no equity warranting a claim before this Court that they have been deprived of due process as to the 1937-1938 taxes, or, if there is such equity, the New Jersey Supreme Court will entertain application for certiorari to review the State Board judgment for those years, after the final determination of the unconstitutionality of the settlement acts. In no sense is the case of *Brinkerhoff-Faris Co.* v. *Hill*, 281 U. S. 673, 679, relied upon by petitioners, applicable. In that case, the court stated:

> "At no time did the State provide to the plaintiff an administrative remedy against the alleged illegal tax . . .

> "If the judgment is permitted to stand, deprivation of plaintiff's property is accomplished without its ever having had an opportunity to defend against the exaction."

Here the debtor has enjoyed a full review before a state quasi-judicial tribunal, and, as indicated, may have a further review in the State courts if its contentions as to the equities of the situation are valid.

The appeals which the debtor prosecuted to the State Board of Tax Appeals for the tax years 1939-1941, inclusive, were still pending before the Board at the time of the adoption by the legislature both of Chapter 290 of the Laws of 1941 and of Chapter 241 of the Laws of 1942, the latter on May 21, 1942. Nothing in either Chapter 290 or Chapter 241 prevented the Trustees from preserving their rights of review with respect to taxes for the years 1939-1941, inclusive, and at the same time taking advantage of those acts. As heretofore noted, Chapter 241 did not require that the debtor file a discontinuance of its pending appeals with the State Board of Tax Appeals. It only required that it should, prior to June 15, 1942, deliver to the State Treasurer consents to the discontinuance of such proceedings. In view of the pending injunction against the State Treasurer in the Court of Chancery, it was impossible for the Treasurer to accept such discontinuances and file them with the State Board, and, so far as the record herein discloses, the right of further review as to 1940 taxes still continues.

With respect to the tax year 1939, it is true that the State Board of Tax Appeals dismissed the debtor's appeal by judgment entered June 2, 1942, of which the Trustees were advised June 15, 1942 (R. 428a, 429a). But it was perfectly feasible for the Trustees to have applied for a writ of certiorari in the State court to review this judgment

of the State Board and then to have tendered the discontinuance thereof, required by Chapter 241, to the State Treasurer. This would have been in full conformity with Chapter 241 and would have preserved every right that petitioners now claim to have been deprived of. In the event of an ultimate determination that the settlement acts were constitutional, the Trustees would have obtained the benefits thereof, whereas in the event of a determination of unconstitutionality of such acts, the discontinuance tendered to the State Treasurer of the certiorari proceedings to review the judgment of the State Board with respect to 1939 taxes would have been of no force and effect, and the Trustees could have availed themselves of whatever legal objections they had to such judgment in the State courts. As a matter of fact, counsel for the Attorney General made such a suggestion to the Trustees prior to the entry of Order 171 (R. 344a). The Trustees simply ignored this suggestion, obviously in order to create the artificial equity which they now assert. If they are in any wise discomfited as a result thereof, it is a matter entirely of their own doing and the product of their own ineptitude.

Exactly the same situation existed with respect to the 1941 taxes. The Trustees assert that an objectionable retroactive franchise tax was assessed against the debtor for the year 1941, in May, 1942. They contend that the District Court was justified in adjudicating their tax obligations for 1932-1940 inclusive, on the basis of Chapter 241, as a matter of equity, for the asserted reason that compliance with Chapter 241 made it necessary that they forego any right of review of the objectionable retroactive 1941 franchise tax. This is utterly without basis since it was plainly feasible for the Trustees to take the same protective action with respect to the 1941 assessment, as just indicated with respect to 1939 taxes, without the necessity for an adjudi-

cation by the bankruptcy court of past taxes upon the basis of Chapter 241. They could have filed an appeal to the State Board of Tax Appeals from the objectionable 1941 assessment, then tendered a discontinuance of the appeal to the State Treasurer, with the result that should the settlement acts be held unconstitutional, the discontinuances would never have been filed with the Board and their remedy of review by the Board and the courts would have continued unimpaired.

It is thus obvious that as to taxes for each of the years, 1939-1941, no right of review on behalf of the Trustees need have been sacrificed by a simple order by the bankruptcy court directing the Trustees to comply with Chapter 241, a procedure to which the Attorney General expressed full assent below (R. 64a), and without the illegal and summary destruction of the rights of the State and of the City of Jersey City which would have been accomplished if Orders Nos. 163 and 171 had gone unreversed by the Circuit Court of Appeals.

As has been already seen, nothing in the mandate or the opinion of the Circuit Court prevents the bankruptcy court from now making any lawful review of the amount and legality of the taxes owing, under Section 64(a) of the bankruptcy act, if that section shall be determined to be applicable to Section 77 proceedings. The issues below did not require a determination thereof. Full opportunity for review of all of the taxes in question was granted the debtor before the State tribunals and no denial of due process has taken place.

(b) Alleged Lack of Status of Attorney General to Maintain Appeal in the Circuit Court.

Petitioners assert that the Attorney General had no status to appeal from Order No. 163 and contend that the

overruling of this contention by the Circuit Court presents a question of "orderly federal procedure which this Court has not passed upon". There is obviously no question of federal procedure involved whatsoever. The question raised involves only the construction of the status of the Attorney General under the Constitution and laws of the State of New Jersey. The opinion of the Circuit Court of Appeals cogently expounds the clear right and duty of the Attorney General to prosecute the appeal (R. 720-723), as well as the immateriality of the position assertedly taken by the State Comptroller before the bankruptcy court (R. 722-723). Petitioners now, for the first time, in this Court, make the further contention in this regard that the Attorney General was without standing to prosecute the appeal on behalf of the State because his conduct of the civil information proceedings in Chancery was on behalf of "the people" of the State and not the State. Whatever be the distinction which petitioners may have in mind, the right and duty of the Attorney General to protect the pecuniary interests of the State by appeal from an adverse decision of the bankruptcy court can in no way be qualified by the nature of his appearance in an entirely collateral proceeding in the State courts.

The further contention that the Attorney General did not raise the issue of the constitutionality of the settlement acts before the District Court, is without merit. The Circuit Court stated, and perfectly soundly (R. 725):

> "The record shows the fact to be otherwise. In his affidavit filed in response to the trustees' order to show cause the Attorney General contended that the district court should not determine the constitutionality of the state statutes but should await determination of that issue by the state court in which the proceedings were then pending. However, he also averred: 'I hereby reassert that Chapter 290 of the Laws of 1941, as amended by Chapter 241 of

the Laws of 1942, violates the said constitution of the State of New Jersey for the reasons set forth in the supplemental information.' He thus not only urged the impropriety of the court's exercising its jurisdiction but in the alternative put the constitutionality of the settlement acts at issue.''

Asserted Conflict of Decision Below With Decisions of Supreme Court.

(2) The second reason why petitioners allege that writs of certiorari should issue is that the decision of the Circuit Court of Appeals probably is in conflict with principles established by decisions of this Court. This assertion is based on the argument disposed of hereinabove, that the decision and mandate of the Circuit Court leave the Trustees without any remedy to contest the legality and amount of the taxes originally assessed, should the Court of Errors and Appeals hold the settlement acts unconstitutional.

We have hereinabove demonstrated in detail the lack of foundation in fact for the assertion. There is therefore no conflict whatever with the decisions of this Court which concededly guarantee taxpayers a hearing on review of such taxes in the State courts.

Asserted Conflict of Decision Below With New Jersey Local Law.

(3) The third reason assigned by petitioners why writs of certiorari should issue is that the Circuit Court has decided an important question of New Jersey law in a way probably in conflict with applicable local decisions. In support of this, petitioners maintain that under the New Jersey cases, a statute later declared unconstitutional is not void *ab initio*, and that steps taken in good faith under such a statute are effective. This is qualified by petitioners'

concession that there may be a doubt as to the rule, where there has been a prior challenge to the validity of the statute, as was the case here, at least so far as concerns the Trustees' surrender of rights of further review of 1939-1941 taxes.

In response to the foregoing, we submit: (a) that the Trustees took no steps under the settlement acts, in good faith, which constitute any foundation for the assertion that the Circuit Court of Appeals has decided any question of local law; (b) that of the New Jersey cases cited by petitioners, only *Lang* v. *Bayonne*, 74 N. J. L. 455, is at all applicable, and that the *dictum* in that case upon which petitioners rely was squarely overruled by the Court of Errors and Appeals in *Hyman* v. *Long Branch Kennel Club*, 115 N. J. L. 123; and (c) that applicable decisions of this Court, including *Meredith* v. *City of Winter Haven*, 88 Lawyers' Edition 1 (No. 42, October term, 1943), relied upon by petitioners, firmly establish the correctness of the course of action enjoined upon the bankruptcy court by the Circuit Court of Appeals. We shall discuss these points in the order stated.

(a) The Circuit Court of Appeals Has Not Decided Any Question of Local Law.

The supposed rule of local law which petitioners maintain has been probably violated by the ruling of the Circuit Court concerns the much mooted question as to the legal effect which ultimately attends actions taken in reliance upon invalid statutes prior to the judicial determination of their invalidity. That question was in no sense here involved. It is at once apparent that the settlement acts constituted only an offer to railroad taxpayers, including the debtor. All that the act called for on the part of any taxpayer was an election as to whether the taxpayer would

or would not accept the purported offer of compromise. Only so much of the action of the bankruptcy court, in entering Order No. 163, as authorized the Trustees to accept the legislative offer, and the consequent tenders by the Trustees, can be said to have been action in reliance, in good faith, upon the statute. So much of Order No. 163 as goes beyond the authorization for such acceptance, and undertakes, dispositively and finally, to adjudicate the tax claim of the State, was a voluntary and gratuitous act of the bankruptcy court, planned by the Trustees to enable the debtor to escape any adverse decision of the question of constitutionality of the settlement acts then pending in the State courts (*via* the rule of *Chicot County Dist.* v. *Bank,* 308 U. S. 371), and was in no sense an action taken in good faith under any supposed requirements of the settlement acts.

Moreover, the issue involved in such cases as *Lang* v. *Bayonne, supra,* and *Hyman* v. *Long Branch Kennel Club, supra,* will be ripe for determination only after the ultimate determination by the New Jersey courts of the unconstitutionality of the acts. At the date of the making of Order No. 163 and at the time of the entry by the Circuit Court of its mandate, there was, as yet, no determination whatsoever as to the constitutionality of the acts, but only a pending challenge thereof in the New Jersey courts. Since the local rule of law referred to by petitioners concerns only the effect, *after* the judicial determination of unconstitutionality, of prior action in reliance upon a statute, it is seen that the Circuit Court of Appeals was not at all required to make a determination in any way calling for the application of the local rule, whatever that rule may be determined to be.

It has already been demonstrated above that the Trustees were not required to surrender any rights in order to

comply with the settlement acts, but only to tender waivers of such rights to the State Treasurer, tenders which could not operate to cut off any rights of the Trustees, in the pending posture of the State litigation, until and unless there should be a final determination by the State courts that the settlement acts were valid. Any failure by the Trustees to preserve pending rights to contest the taxes was gratuitous, not required by the settlement acts, and certainly not in any *bona fide* reliance upon them, so far as 1939-1941 taxes were concerned, since the litigation affecting the validity of the state statutes was pending when further review of 1939-1941 taxes was surrendered by deliberate inaction by the Trustees not required by the settlement acts.

(b) The Local Law of New Jersey as to the Ultimate Effect of Action under an Unconstitutional Statute is Contrary to the Statement Thereof in Petitioners' Brief.

In *Hyman* v. *Long Branch Kennel Club,* 115 N. J. L. 123, not cited in petitioners' brief, the Court of Errors and Appeals, in its most recent determination of the question, held that an unconstitutional statute could not be said, as a general rule, to constitute a lawful sanction for actions taken under it prior to a determination of its unconstitutionality. Citing the earlier case of *Central Railroad Co.* v. *State Board of Assessors,* 75 N. J. L. 771, the court approved the rule that an invalid act, "never had any vitality. It is as if it had never been passed . . ." (pp. 126, 127). The court expressly overruled the broad dictum in *Lang* v. *Bayonne,* 74 N. J. L. 455, adopted on the authority of the Connecticut decision of *State* v. *Carroll,* 38 Conn. 449, to the effect that "every law of the legislature, however repugnant to the constitution, has not only the appearance and semblance of authority, but the force of law".

The *Lang* case was specifically limited in the *Hyman* case as authority only for the proposition that a policeman appointed by a municipal Board of Commissioners, organized under an unconstitutional statute, was at least a *de facto* officer, so that acts done by him antecedent to a judicial declaration that the statute is unconstitutional, are valid, so far as they involve the interests of the public and of third persons. So much of the language in the *Lang* case as went beyond this bare holding was repudiated by the court in the *Hyman* case.

The view stated in the *Hyman* case accords with the earlier decision of the Court of Errors and Appeals in the case of *Eastwood* vs. *Russell,* 81 N. J. L. 672, notwithstanding the citation of that case as purported authority by the petitioners. In the *Eastwood* case, the court, at page 676, expressly said:

> "It must also be borne in mind that when the judgment of a court declares what the law is, that declaration means that it has always existed as so declared".

The case of *In re Public Utility Board,* 83 N. J. L. 303, is a Supreme Court decision which follows the *dictum* in the *Lang* case which, as has been seen, was repudiated in the *Hyman* case.

The case of *Allison* v. *Corker,* 67 N. J. L. 596, cited by petitioners, has no materiality to the question under discussion.

Thus, (1) the Circuit Court of Appeals was not called upon to, and did not, render any decision at all involving any question of local law, and (2) the rule of local law adverted to by petitioners is not as stated by petitioners, the correct and subsisting reflection thereof being a later decision of the Court of Errors and Appeals not even cited by petitioners.

(c) The Determination of the Circuit Court of Appeals is in Accord with Applicable Decisions of this Court.

Petitioners maintain that the situation confronting the bankruptcy court, prior to the entry of Order No. 163, was such as to make it mandatory that the court determine "the law of the State" with respect to the legality and effectiveness of the settlement acts, prior to June 15, 1942, "or else allow the statutory offer to lapse". It is plain that the bankruptcy court was placed in no such dilemma. The court was called upon only to determine whether the interests of the debtor estate made it desirable that the Trustees be authorized to undertake to comply with the settlement acts. The situation of the debtor in this respect was no different than that of the many other railroad companies and systems required to elect whether they would comply with the acts. Substantially all of them have made tenders under the acts and are now awaiting the final determintion of the New Jersey courts as to the constitutionality thereof. Included among these other roads are two, the Erie Railroad Company and the New York, Susquehanna & Western, which were then in reorganization.

The assertion by the Trustees that they were equitably entitled to a judicial assurance, by adjudication thereof, that the tax obligation of the debtor was no more than the amount of the principal taxes, if they were to make a binding agreement with the State for the surrender of their rights to contest the assessments, even if conceded, which it is not, constituted no logical basis for the entry of Order No. 163. This is for the reason that, while the Trustees had the power to do everything on their part required to be done to comply with the settlement acts, the State could not effectively accept the tenders of monies and documents, because of the pending injunction against

the State Treasurer, and the Trustees were therefore absolutely assured that the effective surrender of their rights could only take place upon a concomitant determination by the New Jersey courts that the settlement acts were valid, thereby securing to the Trustees the full benefits thereof. As has already been shown hereinabove, it was perfectly feasible for the Trustees to preserve all existing rights of contest of the assessments and at the same time make tenders agreeable to the provisions of the settlement acts. The adjudication of the tax claims of the State by the bankruptcy court, as was done in this case by Order No. 163, with no hearing of the controverted issue of constitutionality of the state acts upon which the order was based, was therefore not only improper, but also unnecessary to the protection of any conceivable interest of the Trustees.

The citation by the petitioners of the recent decision of this court in *Meredith* v. *City of Winter Haven, supra,* is inapposite. In that case it was held that under ordinary circumstances a federal court whose jurisdiction is invoked upon the basis of diversity of citizenship is required to make a determination of the local law with respect to the subject matter of the suit, even though such law is not clearly indicated by state court decisions. The Court painstakingly outlined, however, a number of exceptional classes of cases wherein it is inappropriate for the federal court to make a determination of local law. Included therein is the situation where the court will stay proceedings before it to enable the parties to litigate first in the state court, questions of state law, decision of which is preliminary to, and may render unnecessary a determination by the federal court of constitutional questions. In this connection this Court cited its recent holdings in *Railroad Commission* v. *Pullman Co.,* 312 U. S. 496, *Chicago* v.

Fieldcrest Dairies, 316 U. S. 168, and *Thompson* v. *Magnolia Petroleum Co.,* 309 U. S. 478, 483, 483, the first two of which authorities were also relied upon by the Circuit Court in the present case. This Court said in the *Meredith* case (88 Lawyers' Edition at p. 5):

> "It is the court's duty to do so when a suit is pending in the State courts, where the State questions can be conveniently and authoritatively answered, at least where the parties to the federal court action are not strangers to the State action, Chicago *v.* Fieldcrest Dairies, 316 U. S. 168".

The situation presented in the *Chicago* case was closely analogous with that here involved. There is here, moreover, a closer degree of identity between the parties to the litigation in the federal and the state courts than there was in the *Chicago* case. The State is a party to the present litigation and is obviously the real party in interest in the Chancery proceedings. In the *Chicago* case, the pending state court litigation involved none of the parties in the federal court, but only a parent corporation of one of the federal litigants (316 U. S. 168 at p. 173). In the *Chicago* case Mr. Justice Douglas referred to the "delicacy" of the issue of state law involved, the asserted repugnance of a city ordinance to a state law. How much more delicate is the question of state law here involved, the repugnance of a state statute involving a remission of many millions of dollars of obligations owing to the State, to the prohibitory provisions of the State Constitution.

The soundness of the ruling by the Circuit Court of Appeals is unquestionable.

Conclusion.

This case involves no matter properly warranting the exercise of the discretionary review of certiorari by this Court, and it is respectfully submitted that the prayer for the issuance of writs of certiorari should be denied.

Respectfully submitted,

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